No. 89-431

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

YELLOW FREIGHT SYSTEM, INC.,

Petitioner,

vs.

COLLEEN DONNELLY,

Respondent.

RESPONSE OF COLLEEN DONNELLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are:

(1) Whether state and federal courts have concurrent jurisdiction over sex discrimination cases brought under Title VII of the Civil Rights Act of 1964 [42 U.S.C. Sec. 2000e, *et seq.*]; and

(2) Whether the reviewing courts properly affirmed the finding of the trial court that the claimant satisfied her duty to take reasonable steps to minimize her damages. Respondent disagrees with the petitioner's description of this issue.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was handed down on April 28, 1989 and is reported at 874 F.2d 402. The petition for rehearing was denied. The decision of the United States District Court for the Northern District of Illinois was handed down on March 17, 1989 and is reported at 682 F.Supp. 374. The Report and Recommendation of the United States Magistrate and the opinion of the District Court entered on November 22, 1985 on the issue of jurisdiction were not reported.

JURISDICTION

This Court has jurisdiction of this matter pursuant to 28 U.S.C. Sec. 1254(1).

STATUTE INVOLVED

The following statutory sections are set out in the petition:

42 U.S.C. Sec. 2000e-5(f)
42 U.S.C. Sec. 2000e-5(g)
42 U.S.C. Sec. 2000e-5(j)

STATEMENT OF THE CASE

The facts of this case are drawn from testimony in a trial conducted before a Magistrate. Defendant Yellow Freight System, Inc., admitted its liability for sex discrimination under 42 U.S.C. Sec. 2000e [Title VII of the Civil Rights Act of 1964] and the matter proceeded for a determination of damages.

Plaintiff applied for work with defendant Yellow Freight in October of 1982, shortly after moving to the Chicago area. Tr. 13, 14. She wanted to work in the area where she lived, and Yellow Freight was four blocks away. Tr. 13, 19. Defendant's terminal manager informed plaintiff that Yellow Freight was not hiring but that she would

be the first hired when the next opportunity arose. Tr. 15. She called the manager every week, as directed, to check for job openings. Tr. 16. She knew, from talking with others, that Yellow Freight was hiring, but the manager told her that they were laying off rather than hiring. Tr. 33, 34.

Plaintiff checked the want ads for jobs and checked with friends and various other persons. Tr. 16-21. In November of 1982, plaintiff obtained a job working part-time for RGIS, located near her home. She worked there until June of 1984 when she filed her EEOC complaint and was then hired by defendant. Tr. 16, 17, 29. She accepted all the hours that were available to her at RGIS, working 423 hours in 1983 and 371 hours prior to June of 1984. Tr. 39, 40.

The Magistrate also found that Yellow Freight had begun hiring numerous persons, all male, in February of 1983. The Magistrate further found that Yellow Freight had not carried its burden of showing that plaintiff had failed to exercise reasonable diligence in securing other employment. Pet. App. A-27–A-30. The Magistrate further found that even if defendant had met its burden of proof on that issue, defendant nonetheless had failed to meet its additional burden of showing a reasonable likelihood that plaintiff might have found comparable work through reasonable diligence. Pet. App. A-30. Other trucking companies had hired 90 dock workers during the time in question, but only one hired women and only five of the 90 were women. Pet. App. A-30.

The Magistrate recommended back pay from the date that defendant began hiring [February 8, 1983] in the amount of $27,656.61; retroactive seniority in the amount of $4,800.00; pension contributions in the amount of $3,976.00; attorneys' fees of $21,876.00; costs; and prejudgment interest.

Pet. App. A-28, A-32, A-33. The trial court implemented those recommendations except as to prejudgment interest. Pet. App. A-23. The Court of Appeals for the Seventh Circuit affirmed the various awards to plaintiff and returned the case for entry of an order granting prejudgment interest. Yellow Freight's petition for rehearing was denied, and their petition for certiorari was docketed on September 13, 1989.

SUMMARY OF THE ARGUMENT

Certiorari is not appropriate at this juncture because the jurisdictional issue has not been developed in adequate scope by the circuits, with only two circuits having provided adversarial based analysis. There is also an alternative basis for resolution of this case which is independent of this issue, and that would require remand for further consideration even if certiorari was granted and the case was reversed on review. As to the question of damages, there is no conflict between any of the circuits as to the appropriate standard and, again, there was an alternate basis for the court's finding in that regard which would require affirmance even if the Court concurred with petitioner's contention.

ARGUMENT

I.

ALTHOUGH THE SEVENTH AND THE NINTH CIRCUITS NOW DIFFER AS TO WHETHER STATE AND FEDERAL COURTS HAVE CONCURRENT JURISDICTION OF SEX DISCRIMINATION CHARGES BASED ON TITLE VII, THAT DIVERGENCE OF OPINION DOES NOT REQUIRE INTERVENTION BY THIS COURT AT THIS TIME.

The Seventh Circuit and the Ninth Circuit now differ on the question of whether state and federal courts have concurrent jurisdiction of actions brought under 42 U.S.C. Sec. 2000e-5(f) [Section 706(f) of Title VII of the Civil Rights Act of 1964] for sex discrimination. The Seventh Circuit in this case has found that there is concurrent state and federal jurisdiction, whereas the Ninth Circuit in *Valenzuela v. Kraft, Inc.*, 739 F.2d 434 (9th Cir. 1984) held that the federal courts had exclusive jurisdiction of cases arising under Title VII. [Respondent notes for completeness that this Court mentioned the issue but noted that it was not deciding the question in *Kremer v. Chemical Construction Company*, 456 U.S. 461, 479, 102 S.Ct. 1883, 1896, fn. 20 (1982)].

However, contrary to Yellow Freight's argument, the question remains in a developmental stage and does not have widespread significance. The division of opinion is a limited division, and most circuits have not yet had the opportunity to specifically address the issue. Yellow Freight contended that three other Circuits [Third, Tenth, and Eleventh] concur with the Ninth Circuit. However, in those cases the jurisdictional issue was either not contested or was only mentioned in passing without analysis, and in one instance the cited case was actually reversed.

Until a need arises for unanimity in approach to this issue, Title VII cases can continue to be resolved in the various circuits regardless of whether the forum is state or federal. The issue is not what the law should be, but rather who should apply the law. The consequence of a grant of certiorari would, as to most sex discrimination cases, simply be a determination of the appropriate forum. In this particular instance, the forum determination might possibly be determinative of the right to pursue the action because of the removal scenario. However, in almost all other such cases, the posed question lacks the immediate importance attributed to it by defendant because decisions on the merits of the cases will be the same regardless of the forum.

There is currently adequate case law to guide both federal and state courts in their adjudication of cases brought under Section 706(f) of Title VII. State courts have certainly shown the ability to adequately carry out the intent of Congress in other areas of federal legislation, e.g. 42 U.S.C. Sec. 1983. There is no reason to believe that the same will not be true in this instance, and there is no need to increase the caseload of the circuit courts when the current intent appears to be the opposite, e.g., the increase in the jurisdictional amount in diversity jurisdiction cases.

The absence of analysis in the other cited circuits is reflected in the opinion in *Bradshaw v. General Motors Corp.*, 805 F.2d 110, 112 (3rd Cir. 1986). Plaintiff there brought suit in state court under state tort theories, 42 U.S.C. Sec. 1981, and Title VII, and the defendant removed to federal court. The question of concurrent jurisdiction was not at issue and thus was not briefed, and was only raised by the court at oral argument. The reviewing court simply held, without analysis, that Title VII

vested exclusive jurisdiction in the federal courts. The court went on to note [fn. 3 at 113] that even if concurrent jurisdiction existed, the plaintiff was unlikely to prevail due to the delay in taking action after receiving the notice of the right to sue from the EEOC. Thus there was an independent basis for that court's decision, and it is questionable as to whether the same result would hold in another case where the issue was fully briefed.

Yellow Freight also relied on *Long v. State of Florida*, 805 F.2d 1542, 1546 (11th Cir. 1986). Certiorari was denied as to the plaintiffs' petition (484 U.S. 820, 108 S.Ct. 78) but was granted as to certain nonjurisdictional questions raised by defendant (484 U.S. 814, 108 S.Ct. 65) and this Court subsequently reversed. *Florida v. Long*, ____ U.S. ____, 108 S.Ct. 2354, 101 L.Ed.2d 206 (1988). Florida had argued in the Eleventh Circuit that plaintiffs' suit under Title VII was barred by res judicata, on the grounds that plaintiff had lost similar claims in state court. The Circuit Court mentioned exclusive jurisdiction only in the context of applying res judicata, stating without analysis that res judicata was not applicable because the plaintiff could not have brought his Title VII claim in state court. The Eleventh Circuit apparently accepted the Florida appellate court's statement in an earlier state court appeal that the state trial court had properly ignored plaintiff's Title VII claim because it had no jurisdiction. See *Long v. Dept. Admin., Div. of Retirement*, 428 So.2d 688 (Fla. Dist. Ct. of Appeal 1983).

Finally, in *Jones v. Intermountain Power Project*, 794 F.2d 546, 553 (10th Cir. 1986), the only question before the Tenth Circuit was whether state claims could be pendent claims in a Title VII action. The court answered in the affirmative at 552. The court then noted that its inquiry could end there, but discussed the matter further.

It ultimately noted that the plaintiff could not otherwise have all his claims heard together because Title VII claims could be filed only in federal court, citing *Valenzuela* without discussion. Again, the question was presented in an indirect context, apparently without benefit of briefs, and the holding was dicta.

The only other circuit court opinion was *Dyer v. Greif Bros., Inc.*, 755 F.2d 1391, 1393 (9th Cir. 1985). The Ninth Circuit again raised the jurisdictional question itself after removal and simply followed the circuit's prior ruling in *Valenzuela*. This subsequent decision by a different panel was seemingly without enthusiasm, as reflected in the comment at 1393, that "Nonetheless, since *Valenzuela* is the current law of this circuit by which we are bound, . . .", and leaves room to question as to whether *Valenzuela* will remain the law.

In summary, only two circuits have reached a reasoned determination of the jurisdictional question, and one of those seems unenthusiastic about its own earlier ruling. For that reason, the jurisdictional question has not received the type of thorough inquiry that frequently precedes review by this Court. If certiorari is deferred until more circuits have an opportunity to analyze all facets of the issue, it may well be that the issue will be resolved with unanimity and without need for supervision. The question is not yet ripe for certiorari.

Even if certiorari was granted and a reversal subsequently occurred, the matter would nonetheless not be brought to a conclusion. The case would then have to be remanded for a ruling on Donnelly's claim that the state court filing equitably tolled the limitation period. Although the state court claim did not specifically refer to Title VII, the allegations were couched in that language and were based upon the EEOC's right to sue letters attached as

exhibits. The case was removed and the complaint was amended to add a specific reference to Title VII. Under *Fox v. Eaton Corporation*, 615 F.2d 716, 719 (6th Cir. 1980), *cert. denied*, 450 U.S. 935, 101 S.Ct. 1401 (1981), a claim filed in state court can toll the limitations period regardless of whether concurrent jurisdiction is found. Whether the Seventh Circuit would agree with *Fox*, in view of its reasoning in the overruled *Brown v. Reliable Sheet Metal Works, Inc.*, 852 F.2d 932, 934 (1988), is immaterial. The point is that the court did not have to reach this argument in this case, and remand for further consideration would be necessary in order to resolve this additional claim.

II.

THE REVIEWING COURT PROPERLY AFFIRMED THE DECISION OF THE TRIAL COURT WHICH FOUND THAT PLAINTIFF SATISFIED HER BURDEN OF SHOWING THAT SHE EXERCISED REASONABLE DILIGENCE IN MITIGATING HER DAMAGES. THERE IS NO CONFLICT BETWEEN THE CIRCUITS ON THIS POINT.

The conflict claimed by defendant Yellow Freight does not exist. In this case, the trial court resolved a factual question as to whether plaintiff had satisfied her duty to mitigate her damages. She had searched for other work, and accepted part-time employment in the area of her home. She worked as many hours as were available at that job. The job was a substantial one, and her conduct was especially reasonable in light of the fact that defendant was falsely telling plaintiff that she would be the first one hired when hiring resumed. Presumably plaintiff thought she would be working for defendant shortly, and it would have seemed a useless act to take a full time job elsewhere with the intent to quit immediately upon hearing from Yellow Freight. In plain language, defen-

dant lied to her about its plan to hire her imminently and now argues that she should not have relied on their representation of imminent employment when considering other job opportunities.

The Seventh Circuit did not set a new standard in this regard and certainly did not hold that the employee had to simply seek other employment. Pet. at 15. Here plaintiff did seek other full time work. The Magistrate noted that Yellow Freight had failed to carry its burden of showing that Ms. Donnelly failed to exercise reasonable diligence. It is equally important to note that the Magistrate also found that Yellow Freight failed to show a reasonable likelihood that Ms. Donnelly would have found comparable work through reasonable diligence. After all, the other trucking companies in the area were apparently also discriminating as only one of them hired women and that one hired only a very small number of women. The court below mentioned but did not have to reach this latter point: defendant's failure to prove the likelihood of comparable employment would thus have served as an alternate basis for affirmance of the damage award.

The damage award was determined by the particular facts of this case and not by any change in the law by the Seventh Circuit. The court was bound by the trial court's award of damages unless that determination was clearly erroneous. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 424, 95 S.Ct. 2362, 2375 (1975). Under appropriate circumstances, such as were found by the trial court to exist in this case, part time work can satisfy the requirement of reasonable diligence. *Wheeler v. Snyder Buick, Inc.*, 794 F.2d 1228, 1234 (7th Cir. 1986).

This case does not conflict with the holdings of *Ford v. Nicks*, 866 F.2d 865 (6th Cir. 1989) and *Johnson v. Chapel Hill Independent School District*, 853 F.2d 375 (5th

Cir. 1988). The court in *Ford* rejected the employer's argument that the applicant's part time work for her husband [without showing a reason for not getting a better job] constituted a failure to mitigate damages, noting at 869 that the employer had not shown what she could have earned if employed full time. The opinion instead rested on the applicant's rejection without cause of an equal job at the same salary. In *Johnson*, there was evidence of numerous equal employment opportunities not sought out by the applicant: rather than seek work, she simply went to work in a family store without pay. Both cases are factually and legally distinguishable.

CONCLUSION

For the reasons stated, respondent Colleen Donnelly requests that the petition for certiorari be denied.

Respectfully submitted,

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